Vol 312

Office - Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 681

THE SHIP CONSTRUCTION & TRADING CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ASBURY HAYNE DEYAMPERT,
HERBERT M. BINGHAM,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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THE SHIP CONSTRUCTION & TRADING CO., INC.,
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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner asks for a writ of certiorari to review the Court of Claims' April 1, 1940, judgment (trial May 3, 1939; motion for a new trial overruled October 7, 1940), reversing its Commissioner and (a) dismissing plaintiff's petition for $3,198,298 damages for breach of contract by the United States Shipping Board, hereinafter referred to as the "Board," to sell wooden ships and (b) awarding $624,479.89 of which $324,361.62 is interest from March 18, 1922, to defendant on its counterclaim for an overpayment of $299,918.27 by the United States Shipping Board Emergency Fleet Corporation (now the Merchant Fleet Corporation, 46 U. S. C. A. 810a), hereinafter referred to as the

"Fleet Corp.", under a contract between the Fleet Corp. and plaintiff for the building by plaintiff of two wooden ship hulls.

Short Statement of the Matter Involved.

Court of Claims' 12 *Findings Summarized.*

1. The Board advertised wooden ships for sale (R. 36). 2. Plaintiff bid $2,100 each for the fleet (142 to be operated and the remainder to be junked), including undisposed of material removed as the ships were laid up and supported the bid with a certified check endorsed: " * * * to be returned by Aug. 10, 1921, if said bid is not accepted" (R. 39-40). 3. As a result of negotiations, plaintiff amended its bid to conditionally exclude 71 ships and unconditionally such removed material as the Board could not replace identically or in kind. If the bid were accepted, a formal contract was to be executed but "in the meantime" both were to be "firmly bound". Seventeen (including 9 disposed of for in excess of the bid price) were excluded, leaving 268, of which currently 10 were sold for $5,000 each, 1 for $8,000 and 1 transferred to the Navy was sold in 1928 for $10,650 (R. 40-45). 4. The Board did not adopt or approve the resolution set out in its official minutes for Aug. 9, 1921, accepting plaintiff's bid. Commissioner Lissner, who had been designated therefor, refused to approve said minutes prepared by the Board's secretary. The Board did not take any action unconditionally accepting plaintiff's bid. Action on the bid was authorization for negotiations by the Chairman, a commissioner and Mr. Farley, as a committee (R. 45-49). 5. No appraisement within the meaning of the statute authorizing sale "after appraisement" was made prior to August 15, 1922 (R. 50). 6. Commissioner Plummer informed plaintiff that the Board adopted a resolution accepting plaintiff's bid. He was not present

during much of the discussion and was not correctly informed. A certified copy of the acceptance resolution (bearing the Board's official seal (R. 88)), was delivered to plaintiff. The Board did not authorize the delivery. With knowledge that plaintiff claimed there had been an acceptance, and after having submitted four drafts of proposed contract which plaintiff "refused to accept on the ground none contained all the terms * * * of the bid", the Board resolved to present plaintiff with the form of contract satisfactory to its counsel and give plaintiff until August 23rd to execute same, failing which "all agreements and negotiations * * * be terminated * * * and * * * action * * * taken be * * * rescinded * * *" (R. 50-53). 7. In consideration of maintaining the *status quo*, and upon the mutual understanding that subsequent negotiations would be without prejudice to then existing rights, the Board extended time for execution of the contract to "September 29th at noon." September 8th plaintiff agreed to pay $2,400 each for the ships. September 27th, having concluded there had been no sufficient appraisement, the Board resolved to decline to enter into a contract and delivered plaintiff a copy of the resolution. September 28th the plaintiff executed and delivered said contract to the Board (R. 53-58). 8. October 8th the Board offered to, and February 13th, 1922, did return the certified check, on plaintiff's consent without prejudice (R. 58). 9. In August, 1922, the Board had the ships appraised. The appraisement was $2,500 a vessel (R. 58; for scrap and minus removed equipment, R. 181, 41-42). 10. In September, 1922, the Board sold 226 and in 1923, 9 of the 268 ships for scrap, exclusive of the removed material, for $3,318.58 each and the dismantler lost $1,196.16 a ship, but nine other dismantlers of two ships each realized an average of $2,061.45 a ship (R. 58-59). 11. "There was no established market value for the vessels. * * * The fair and reasonable value of the

fleet of 268 * * * at the time of plaintiff's bid (July 30, 1921), and at all times thereafter to and including September 27, 1921, did not exceed the amount bid * * * $2,100 a vessel. The evidence * * * does not establish what profit, if any, plaintiff could have realized on the ships as a whole if they had been delivered * * * in accordance with its bid or * * * the contract first proposed but later withdrawn * * * before acceptance. The separate value of machinery, equipment, spare parts, and supplies on board the vessels or on shore * * * is not satisfactorily proved" (R. 59). 12. June 15, 1917, the Fleet Corp. gave plaintiff a contract to construct two ship hulls. July 11, 1917, the President delegated to the Fleet Corp. power Congress had given him regarding construction of vessels. Work by plaintiff having been previously stopped under the provisions of said contract, November 22, 1917, the same parties made a supplemental contract. Construction was completed thereunder at the expense of the Fleet Corp., which overpaid plaintiff by means of checks on deposits available to it under the Act of Sept. 7, 1916, and subsequent Acts of Congress. Feb. 28, 1922, the Fleet Corp. stated an account showing a balance of $488,310.24 and delivered it to plaintiff on or before March 18, 1922. The parties stipulate that if the defendant may assert the claim for the overpayment, there is due ("upon the trial", R. 262) $299,918.27 (59-68).

References to and discussions of the evidence material to the questions presented and errors assigned are set forth under the pertinent points in the brief submitted herewith.

Relevant Parts of Statutes Involved.

Act of Sept. 7, 1916, c. 451, sec. 3; 39 Stat. 729; 46 U. S. C. A. 804:

> "A board is hereby created to be known as the United States Shipping Board and hereinafter referred to as the board * * *"

* * * * * * *

"The duties of the board may be so divided that under its supervision the directorship of various activities may be assigned to one or more commissioners * * * The board shall have an official seal, which shall be judicially noticed."

Act of Sept. 7, 1916, c. 451, sec. 11; 39 Stat. 731; 46 U. S. C. A. 810:

"The board * * * may form under the laws of the District of Columbia one or more corporations for the * * * construction * * * of merchant vessels in the commerce of the United States. The total capital stock * * * shall not exceed $50,000,000. The board may * * * subscribe to, purchase, and vote not less than a majority of the capital stock * * *. The board, with the approval of the President, may sell any or all of the stock * * * but at no time shall it be a minority stockholder therein * * *"

Act of June 5, 1920, c. 250, sec. 4; 41 Stat. 990; 46 U. S. C. A. 863: Set forth in finding 12 (R. 67).

Merchant Marine Act of June 5, 1920, c. 251, sec. 5; 41 Stat. 990; 46 U. S. C. A. 864:

"* * * the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this chapter, at public or private competitive sale after appraisement and due advertisement * * * all the vessels * * * acquired by the board. Such sale shall be at such prices and on such terms and conditions as the board may prescribe."

Questions Presented and Errors Assigned.

The primary questions are:

1. Was there a contract between plaintiff and the Board for the purchase and sale of the ships?

2. Was there sufficient appraisement of the ships to satisfy the statute directing their sale "after appraisement"?

3. How much damage did plaintiff sustain as a result of the Board's breach of the contract to sell the ships?

4. Does the defendant own or may it assert the counterclaim for the overpayment to plaintiff by the Fleet Corp. in connection with the contract between the Fleet Corp. and plaintiff for the building of two ship hulls?

5. Should interest have been allowed on the unliquidated counterclaim?

The court below erred in finding damages were not proved and in making findings and conclusions based upon negative answers to questions 1 and 2 above and affirmative answers to questions 4 and 5 above. It also erred in making findings and conclusions based upon negative answers to underlying detailed questions 6, 7, 9, 10, 12, 13, 14, 16, 19, 20, 22 and 23 and affirmative answers to such questions 8, 11, 15, 17, 18 and 21, set forth below, because "only the questions specifically brought forward" will be considered:

6. On the basis of findings 4, 6 and 7 is the document executed and delivered to the Board Sept. 28, 1921, a binding contract? 7. Is there a lack of substantial evidence to sustain the material parts of findings 4 and 6 adverse to plaintiff? 8. Are said parts of said findings 4 and 6 sustained by the findings of evidentiary or primary facts? 9. Was plaintiff's bid as amended accepted by the Board? 10. Is the defendant estopped to deny the Board made a contract with plaintiff? 11. Is ultimate finding 5 sustained by the findings of evidentiary or primary facts? 12. Is there a finding as to what was done with reference to appraisement on the issue whether same was a sufficient compliance with the statute directing appraisement? 13. Is the statute

that directs appraisement directory and not mandatory, whereby the sale might have been made without other previous appraisement? 14. Is defendant estopped to deny there was sufficient appraisement of the ships? 15. Does finding 11 cover the pertinent period, whereby there is a finding on damages? 16. Is there a lack of substantial evidence to sustain the relevant and material parts of finding 11? 17. Is finding 11 sustained by the findings of evidentiary or primary facts? 18. Should the evidence of the loss of the dismantler set forth in finding 10 have been received or considered in arriving at values and damages? 19. Should plaintiff's exhibits 42, 43 and 47 for identification have been received and considered in determining values and damages? 20. Is there a lack of substantial evidence to sustain that part of finding 10 which states Western Marine & Salvage Co., lost $281,098.80? 21. Is said part of said finding 10 sustained by the findings of evidentiary or primary facts? 22. Is there a lack of substantial evidence to sustain the material parts of finding 12 adverse to plaintiff? 23. Is there a lack of substantial evidence to sustain that part of finding 12 which states that in making the supplemental contract of Nov. 22, 1917, the Fleet Corp. "was acting for the United States"?

Reasons Relied Upon for Allowance of Writ.

I. The Court of Claims in refusing to conclude, on the basis of its findings 4, 6, and 7, that the form of contract the Board offered to make, if plaintiff would execute and deliver it before "September 29 at Noon", became a binding contract upon the execution and delivery thereof by plaintiff to the Board September 28, 1921, failed to correctly apply this Court's decision in *Union Bank* v. *Geary*, 30 U. S. 99, 114 and the well settled law (*In re All Star Feature Corp.*, 232 Fed. 1004, 1009 (D. C. S. D. N. Y., 1916); *Dillon*

v. *Lineker,* 266 Fed. 688, 690 (C. C. A., 9th Cir., 1920); *Williston on Contracts; Williston & Thompson Edition,* § 136, p. 479, and cases cited in footnote 4 thereof) and reached a grossly unjust and incorrect result.

II. There is a lack of substantial evidence to sustain the material parts of findings 4, 5, 6, 10, 11, and 12 adverse to plaintiff. The evidence is to the contrary of said parts of said findings.

III. Finding 11, that the ships had no value in excess of $2,100, is ill-founded in law because hopelessly and quite obviously contradictory of the parts of findings 7, 3, and 10 that record the $2,400 offer and the numerous sales for greatly in excess of $2,100 within and very close to the period plaintiff would have been taking delivery, had the contract been consummated, and damages of plaintiff were conclusively shown, including the $10,000 spent in getting ready to perform after notice from the Board of acceptance (R. 85).

IV. The conclusion (R. 69) that the defendant owns or may recover upon the counterclaim is contrary to this Court's decisions in *Sloan* v. *U. S.,* 258 U. S. 549, 565, 566, 571; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.,* 294 Fed. 641 (C. C. A. 2nd), certiorari denied 264 U. S. 586; *U. S.* v. *Strang,* 254 U. S. 491, 493; *Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, 8, 11; *Merchant Fleet Corp.* v. *Harwood,* 281 U. S. 519, 526; *U. S.* v. *Wood,* 290 Fed. 109, affd. 263 U. S. 680; and the decision in *U. S. S. B. Emergency Fleet Corp.* v. *Tabas,* 22 F. (2d) 398 (C. C. A. 3rd).

V. Allowance of the interest before judgment on the unliquidated counterclaim (the finding of an account stated at $488,310.24 in 1922 is fatally inconsistent with stipulating in 1936 the amount at $299,918.27, for use "upon

the trial") is so contrary to universally recognized law in all courts, including the Court of Claims (*Truscon Steel Co.* v. *U. S.*, 70 Ct. Cls. 727, at 729-730; *Standard Steel Co.* v. *U. S.*, 67 Ct. Cls. 445, at 488-490), and unjust as alone to warrant review and reversal.

VI. Whether the Government owns the Fleet Corp.'s rights under a purely commercial contract is a question in which the public and Congress are vitally interested.

VII. The application is meritorious. Plaintiff has been most unjustly and unfairly treated in the judgment sought to be reviewed and reversed.

Authorities supporting the above reasons are: *U. S.* v. *Clark*, 96 U. S. 37, at 40, 44; *U. S.* v. *Berdan Firearms Co.*, 156 U. S. 552, at 573; *Cramp* v. *U. S.*, 239 U. S. 221, at 232; *Hathaway* v. *U. S.*, 249 U. S. 460, at 463; *Luckenbach S. S. Co.* v. *U. S.*, 272 U. S. 533, at 539; *Indiana Farmers Guide* v. *Prairie Pub. Co.*, 293 U. S. 268, at 281; 28 U. S. C. A. 288 (b).

Certiorari should be granted.

ASBURY HAYNE DEYAMPERT,
HERBERT M. BINGHAM,
Counsel for Petitioner.

January 4, 1941.

BRIEF.

The Opinion Below (R. 69-80) is unreported.
Jurisdiction is invoked under 28 U. S. C. A. 288 (b).

ARGUMENT.

I.

The Form Executed and Delivered by Plaintiff to the Board, September 28, 1921, is a Binding Contract.

Findings 4, 6 and 7 (pp. 2-3 *supra;* R. 45-58,) sustain the above point. The opinion below gave no consideration to it. Finding 11 refers to it as "the contract first proposed but later withdrawn by the board before acceptance".

Knowing that plaintiff claimed that the Board had accepted its $2,100 bid and that the bid provided for a formal contract after acceptance, although in the meantime both were to be firmly bound (p. 2, *supra,* F. 3), the Board, August 19, 1921, delivered to plaintiff the form of contract satisfactory to its general counsel, instead of accepting the $2,400 offer of third parties then before it (*infra,* p. 15). In consideration of maintaining the *status quo,* "without prejudice to the rights of either side" the Board gave plaintiff until "September 29th at noon" to execute and deliver that contract. Plaintiff did so September 28th. The offer could not be withdrawn before the 29th, because there was consideration for the option keeping it open. It was plaintiff's waiving its right to sue immediately for breach of the contract, resulting from the Board's denial of the acceptance and refusal to proceed. Long ago this Court so declared the law to be.

Union Bank v. *Geary,* 30 U. S. 99, affirmed a decree perpetually enjoining enforcement of a judgment by confession against the administratrix of the indorser of a note. Confession of judgment had been induced by a promise that

it would not be enforced and that collection would be made from the maker. Consideration was giving up a doubtful defense, afterward adjudged insufficient. The opinion states (p. 114):

> "It is unnecessary to examine whether this defence would have been available or not. The validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question; and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject; and the complainant, by precluding herself from setting up the defence, waived what she supposed might have been of material benefit to her * * * And to permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things would be sanctioning a most mischievous principle."

The giving up by the plaintiff of said right to sue immediately was adequate consideration, even if it should be ultimately decided that there was no acceptance of the bid originally or by ratification. Doubt was so great, that the Board asked for and received maintenance of the *status quo*.

The revised edition of *Williston on Contracts* by Williston & Thompson (sec. 136, p. 479) stated the rule as follows:

> "* * * But forebearance for a reasonable time if requested is sufficient consideration, even though no promise of forebearance is made, a unilateral contract being as good as a bilateral."

There is a wealth of authorities, including those mentioned in Reason I (p. 7, *supra*), cited in note 4 to said section 136, supporting plaintiff's contention that the contract executed and delivered by plaintiff to the Board September 28th, 1921, is a binding contract.

II.

The Board Accepted Plaintiff's Bid; Ratified and Approved the Delivery of Its Resolution to Plaintiff and the Acceptance Thereby Conveyed; and is Estopped to Deny Same.

In 1922 the seven commissioners constituting the Board; its secretary, Mr. C. W. Smith; its shorthand reporter, Mr. Amand, whose untranscribed notes of the Board's meetings of August 18 and 19, 1921, were read at the trial; and plaintiff's vice-president, Mr. Orth, testified in a mandamus proceeding in the Supreme Court of the District of Columbia in 1922. Their testimony is evidence herein by stipulation.

The opinion of Mandamus Trial Judge Stafford, so far as material, states:

> "Now, the relief asked either would or would not give the petitioner some claim to the property which it does not now possess, * * * If it would not give it any such claim in addition to what it has already by virtue of the offer and acceptance, it would be an entirely useless thing to grant the relief."

Commissioner Hobb's report to the Court of Claims also stated plaintiff's bid was accepted by the Board.

Chairman Lasker, as allowed by statute (*supra*, pp. 4-5), had appointed Commissioner Plummer and Mr. Farley, assistant to the chairman, a committee to direct the sales of the wooden ships (Lasker: R. 110, 116; Farley: R. 161, X Q. 120; Plummer: R. 91, 101; O'Connor: R. 124; Chamberlain; R. 95-96; Orth: R. 81-82; Amand's minutes, August 9, 1921, meeting: R. 104-105; Smith's minutes, August 9, 1921, meeting: R. 107).

As a result of negotiations by plaintiff with said committee, a decision was reached as to what plaintiff "should get and how it should be arrived at" (Orth: R. 87) and "all of the different points discussed and agreed upon" were in-

corporated in plaintiff's amended bid (Orth: R. 82; Plummer, in the August 9, 1921, meeting of the Board; R. 104) submitted as set forth in finding 3.

Commissioner Plummer testified that August 9, 1921, he introduced the resolution accepting plaintiff's bid; that he understood it was passed, and that the delivery to plaintiff of a certified copy of said resolution was made by him or upon his direction (R. 77, 101-102). He said that the resolution was the one "Mr. Farley and I gave to the Board with our signatures. You will find in the minutes that I read it" (R. 95).

Mr. Smith said he was present during the meeting; heard the resolution introduced; believed it was passed; prepared the minutes (set out in finding 4), showing it and other resolutions, covering sales of other ships of the fleet of wooden ships which were consummated (Chamberlain: R. 122-123; Lasker: R. 118), were passed; and certified the copy delivered to plaintiff (set out in finding 6), on which the Board's seal (required to be judicially noticed, *supra*, p. 5), was placed (R. 88).

Commissioner (Senator) Chamberlain said at the Board's August 19, 1921, meeting, "We cannot cancel unless there is some real reason for it" and "We ought to carry out our contract in good faith" (R. 92, 94). He testified: "The resolution, as I recall, was passed by the board * * * as a tentative proposition * * * the resolution was read by Mr. Plummer, and after discussion it was passed as part of the general discussion in connection with the disposition of wooden ships * * *" (R. 122, 75).

Commissioner (Admiral) Benson testified that he was not present at the August 9, 1921, meeting, but a few days later heard three or four of the commissioners say that the Board August 9, 1921, regularly passed the resolution accepting plaintiff's bid (R. 102).

Commissioner O'Connor testified that the Board August 9, 1921, authorized Messrs. Plummer and Farley to trade with plaintiff (R. 124).

Commissioners Thompson, Lissner and Lasker were confronted with portions of the reporter's transcribed notes of the Board's meeting of August 9, 1921, and cross-examined by Judge Stafford (R. 104-105, 106; 107-108; 108-109; 114-115).

Chairman Lasker testified that the "Vote was taken not merely on the resolution but on the scheme of things to be done * * * for me to take it up with the President, and then the resolution, on my declaration that the details were right and that the President approved could have become binding" (R. 117) and that the committee, Messrs. Farley and Plummer, were authorized to make the trade, "That without further meetings we could go ahead," if the details were cleared up and he informed them that the President assented (R. 115). At the Board's meeting of August 18, 1921, he had said "The board accepted this bid subject to his meeting our terms, we can make them what we want" (R. 91) and in its meeting of August 19, 1921, that he did not wish to take the matter up with the President and had not done so (R. 98). He said that the reporter's minutes were "right in effect" (R. 115).

Commissioner Lissner, appointed by Chairman Lasker to approve minutes, because he was "exacting on details" (R. 117) *did not doubt the correctness* of the reporter's transcribed notes of the Board's August 9, 1921, meeting (R. 108). He testified: "* * * the suggestion was made and generally approved that we should take a tentative vote on the high bid * * * in this case" (R. 108, 73). At the Board's August 9, 1921, meeting, when the Chairman asked "Do you want to authorize them to go ahead on that basis?" he said, "What else can we do?" (R. 106, 114-115).

Adoption of resolutions accepting offers of third parties,

set out in the minutes in finding 4 along with the resolution accepting plaintiff's bid, is conceded (Chamberlain: R. 123; Lasker: R. 118).

Commissioner Thompson testified that he voted on the question as stated "with interpretations" (R. 107). August 19, 1921, referring to the Board's August 9, 1921, resolution he said "cannot the Board rescind the former resolution?" (R. 91).

Plaintiff tried unsuccessfully to have the Board produce the reporter's transcribed notes of its August 9, 1921, meeting (R. 222-223). Extracts therefrom, used in cross-examining some of the commissioners and discussed at the August 19, 1921, meeting of the Board are in the record at pages 104-105, 106, 114-115 and 97.

The untranscribed minutes of the August 18 and 19, 1921, meetings as read at the mandamus trial appear at pages 90-91, 91-100 ~~and 116-125,~~ respectively. Commissioner Chamberlain expressed the thought that the minutes of the discussion at the August 19, 1921, meeting "might well be omitted" and the Chairman thereupon directed the reporter: "Don't write up the minutes of this" (R. 100).

August 19, 1921, the Board considered an all-cash offer, from California people, of $2,400 each for the ships, without the removed material (R. 91, 86, 228). The Commissioners and the Board's counsel pointed out and conceded among themselves that plaintiff's bid had been already accepted (Lasker: R. 90-91; Thompson: R. 91; Chamberlain: R. 92, 94; Benson: R. 93, 98; Plummer: R. 95; Lissner: R. 97; O'Connor: R. 100; Farley: R. 96, 98; Schlessinger: R. 95, 96, 98; Freund: R. 94).

Commissioner Plummer stated he had given plaintiff the certified copy of the acceptance resolution so that a performance bond could be obtained (R. 94). The conclusion was that a contract drawn up by Mr. Freund from a letter (the amended bid), and required by it (R. 43-44), would be

given to plaintiff with a demand that plaintiff execute it by noon Monday, or the Board would refuse to make the contract (R. 99-100), and under Mr. Farley's belief that plaintiff could not execute the contract within that time (R. 94). The Board adopted and delivered such a resolution as set out in finding 6. Finding 7 sets forth what happened thereafter.

Recognition that it was ~~an intention to be~~ bound is the only reason worthy of consideration that can be adopted for the Board's sending plaintiff a contract instead of accepting the much more favorable offer.

Retention of plaintiff's check, at a cost of $300 a month to plaintiff (R. 85); the statute requiring judicial notice be given the seal on the copy of the acceptance resolution delivered to plaintiff (p. 5, *supra*); the $10,000 spent by plaintiff in reliance on the communicated acceptance (R. 85); the statute permitting delegation of duties to individual members (p. 5, *supra*) and the delegation to Commissioner Plummer (with Mr. Farley) the sale of the ships (p. 12, *supra*); and *Levinson* v. *U. S.*, 258 U. S. 198, 201; *Commissioner* v. *Aspinwall*, 62 U. S. 539; *Cooke* v. *U. S.*, 91 U. S. 389, 398; *et al.* sustain the estoppel.

In its commercial transactions, the Government has no sovereign privileges (*Bank of U. S.* v. *Planters Bank*, 22 U. S. 904, 907-908; *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 123, 126; *Salas* v. *U. S.*, 234 Fed. 842 (C. C. A. 2nd Cir.).

Furthermore, as Commissioner Admiral Benson testified, it was usual for the Board's secretary to deliver acceptance resolutions to successful bidders without special authorization (R. 102). The Government "must always have some representative authorized to act for it in all the emergencies of its commercial transactions" (*Cooke* v. *U. S.*, *supra*).

The part of finding 6 (pp. 2-3, *supra*) that the Board did not authorize delivery of a copy of its August 9, 1921, reso-

lution is not supported by a scintilla of evidence. The evidence is exactly to the contrary.

The bid and ratification of the acceptance was a contract (*American Smelting Co.* v. *U. S.*, 259 U. S. 75; *Garfield* v. *U. S.*, 93 U. S. 242). The Court of Claims should have reached the result it did in *Briggs & Turivas* v. *U. S.*, 83 Ct. Cls. 664.

III.

Appraisement of the Ships Was Made; Defendant is Estopped to Deny Same; and the Statute Specifying Appraisement Being Directory and Not Mandatory, Sale Might Have Been Made Without Other Previous Appraisement.

In June of 1921, the Board employed Mr. Farley for 2 years at a salary of $20,000 (R. 120). He was an experienced ship broker and dealer (R. 134, 152). He gathered all the information on the wooden ships (R. 120). Mr. Philbin was then and continued to be the Board's Manager of Ship Sales Department (R. 124, 158). Mr. Farley caused additional employees to be put into said Ship Sales Department; Mr. Swan, a naval architect, and others, for the purpose of supplying him data on which he could determine the value of the ships (R. 161, 163, 164, 169, 170-171). He testified that with respect to placing a value on the ships as an authorized representative of the Board: "I made up my mind and then discussed it with Mr. Plummer * * * and with the commissioners" (R. 171, X Q. 285) and that before the bids were opened: "I had made recommendations to Mr. Plummer as to what I thought were the values" (R. 171, X Q. 312).

Chairman Lasker said the ships had been appraised (R. 87-88, 120). Mr. Philbin, in fulfillment of a duty in an executive capacity, submitted to the Board his written estimate of the value of the wooden ships, dated July 12, 1921 (R. 125-

127). The valuation is from $2.00 to $7.50 per ton (R. 226), depending upon the need for repairs, as indicated on plaintiff's exhibit 26 (R. 230-235). The Board circulated advertisements of the ships for sale, approved by its legal counsel (Farley: R. 161, X Q. 124; Philbin: R. 129, Q. 70) which stated: "The Board has established a minimum price on these vessels" (R. 162). Plaintiff received and produced a copy of said advertisement (R. 161).

The Board valued the ships for insurance, as self insurer, at $60 per ton as late as August 1921 (*infra*, p. 20).

The statute does not require sale at not less than the appraisement, but "at such prices * * * as the board may prescribe" (*supra*, p. 5). Appraisement might, therefore, have been deemed to be made at the price accepted (*Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 187, 193; *Johnston* v. *National Sand & Gravel Co.*, 172 La. 388; *Fallon* v. *Hattemer*, 229 App. Div. (N. Y.) 397, 401).

Selling 22 of the ships in August and September, 1921 (R. 122-123, 118, 144), and one January 12, 1922, for $10,000 (*infra*, p. 20) after claiming, about September 27, 1921, non-appraisement as a reason for not consummating the sale to plaintiff (R. 50-52; Lasker (R. 121), shows the lack of good faith of the Board in contending insufficient appraisement. The Board's resolutions (pp. 14-15, *supra*) state it "has done all the things required of it to be done" under the statute directing appraisement (p. 5, *supra*).

The Board's representations, in the advertisements and in its resolutions, that the ships had been appraised estop defendant from denying there was sufficient appraisement. (Authorities in point II.) As was said in *U. S.* v. *Stage Co.*, 199 U. S. 414, at page 424:

> "* * * it is a fact peculiarly within the knowledge of the Government agents and upon which in the advertisement, it spoke with certainty."

Hollerbach v. *U. S.*, 233 U. S. 165, 171-2; *Spearin* v. *U. S.*, 248 U. S. 132, 138; *U. S.* v. *Atlantic Dredging Co.*, 253 U. S. 1 are also applicable.

H. Rep. Report No. 2, 1st session, 69th Congress, of the Committee investigating the Board, states at page 53:

> "Basic prices have been determined for the vessels by a fleet survey report" (Plaintiff's exhibit 26). "These prices so fixed were adopted as the appraisal price of the boats offered * * *. This general policy and plan has been followed since some time in the year 1921."

The August 15, 1922, appraisement for scrap, set out in finding 9, has no bearing on any issue.

IV.

Damages Were Proved.

Mr. Barnett had been in the ship business 30 years; pioneered in building the wooden ships; valued ships almost every day for 15 years; had done so for the Department of Justice and for the Board; knew of all sales of the wooden ships; acted as a broker and operator of and knew the market for wooden ships (R. 139-144, 149, Q. 362). He testified that the wooden ships involved, for operation and equipped accordingly, had a market value of $13,000 each for up to 100, at pertinent times herein, and those for scrap, as they stood, had a market value of $10,500 each (R. 145, Q. 224-225; 147-148, 151).

Mr. Farley, defendant's chief witness, who thought the Board should sell the ships only to be dismantled, because their sale "commercially would have been damaging to the assets of the country in the form of its steel ships" (R. 152, 164), admitted on cross-examination that there was a market for them for operation (R. 165). Mr. Philbin also testified there was a market for them for operation (R. 136, X Q. 261).

Data furnished by the Board to a Congressional Committee [1] and printed by order of Congress, showing the sales recorded in findings 3 and 10 and of one of the ships January 12, 1922, for $10,000; sales of several similar wooden ships for up to $315,000 and of 23 of the 268 involved for $47,000 each in 1919-20, that the Board received $24,000 for each of those 23 before repossessing them, and that the original cost of said 23 was from $643,000 to $791,000 each; and that the Board's valuation for insurance, as late as August 1921, was $60 per ton, were marked for identification plaintiff's exhibits 39, 40-A, and 38, but not received in evidence because the Commissioner considered them to be available as Public Documents (R. 176-177).

H. Rep. Report No. 2 *supra* at page 10 states that as of January 1, 1920, 317 of the wooden ships "were in commercial operation"; at page 30: "* * * during the last four and a half years the Shipping Board has disposed of an average of more than one ship every two days, not counting the 237 wooden ships which were sold for scrapping and the 199 steel ships which were recently sold to Ford for scrapping. The Shipping Board has sold 1,380 ships in the aggregate. * * * We are opposed to a policy of scrapping the ships."; at page 30: "For these vessels sold since June 1921, the Board had received $68,000,000." and at page 34: "In other words, in an effort to promote a ship-scrapping program much misrepresentative and misleading statements in regard to the quality and condition of our ships have been industriously circulated * * * the real motive is to eliminate the possibility of these ships

[1] Printed at pages 2140-2143, 2110-2120, and 4372 of "Exhibits to Hearings before Select Committee of Inquiry into Policies and Affairs of the United States Shipping Board and Emergency Fleet Corporation, House of Representatives, Sixty-eighth Congress" and admissible from said official printing as Public Documents (*U. S.* v. *McCoy*, 193 U. S. 593, at 601; Wigmore on Evidence, 3rd ed. secs. 1684, 1677; *N. Y. Indians* v. *U. S.*, 170 U. S. 1 at 32).

passing into the hands of other American citizens and perhaps being operated in competition; and to destroy as many existing ships as possible in order that there may be more ship construction in the future. * * *"

Defendant's witnesses Farley, Henry, Cox and Von Herbulis testified the ships had no commercial value for operation and all except Henry that their value for scrap was $2,000 each (R. 155-156, 163, 167, 173, 178-179, 180, 186-187, 188). Their opinions and the opinion below were based upon immaterial belief no profits could be made from operating the ships (R. 155-156, 175, 182-183, 189 X Q. 170; 98). Furthermore the recorded sales and fact 317 were in commercial operation make their testimony worthless and no support for finding 11. A threshing machine can't be operated out of season yet it has value (*Redhead Bros.* v. *Wyoming Cattle Co.*, 126 Ia. 410, 102 N. W. 144).

The income tax paid by Western Marine & Salvage Co. (R. 249); its initial realization of from $15,000 to $25,000 for the 496 tons of machinery and metals salvaged from each of the ships (R. 247; 243 tons at $51.73 per ton and 253 tons at $10.76 per ton, or 496 tons at $51.73 per ton); its sale of 36 hulls for $86,500 (R. 253); and failure to try to sell others (R. 208); its receipt of $4,000 to $4,500 insurance for one wrecked hull (R. 205, X Q. 161) and $33,000 for 7 hulls destroyed by fire in Orange, Texas (R. 252); its offering the ships for salvage in 1923 at $12,000 each (R. 243-244), in 1924 at $10,000 each (R. 241) and refusal to consider an offer of $5,000 each (R. 242); its Feb. 28, 1923, valuation of 15 of the ships in Texas at $15,000 each and 205 of them in Virginia at $12,500 each (R. 247), without doubt based on the profit on those theretofore dismantled; and finally its actual receipt of $2,650,313.21 for the 235 for scrap or to be scrapped (R. 254B), minus removed material (R. 59), mathematically more than justify Mr. Bar-

nett's testimony as to the market values of the ships, where the cost of dismantling and selling the salvaged material from each of two of the ships was only $1,818.48 (R. 214) and obviously the fleet could have been handled at a less cost per ship. Proof of damages to mathematical certainty, or indisputable accuracy, however, is not required (*Eastman Kodak Co.* v. *Sou. Photo. Mat. Co.*, 273 U. S. 359, 378; *Hetzel* v. *U. S.*, 169 U. S. 26, 39; *U. S.* v. *Burton Coal Co.*, 273 U. S. 337).

A "verdict" based on a less valuation than the minimum price of the numerous current sales at from $5,000 to $25,000 for operation (R. 147-148; *supra* p. 2) and $3,318.58 for scrap is a miscarriage of justice (*U. S.* v. *Swift & Co.*, 270 U. S. 124, 149; Williston on Contracts, rev. ed. Williston and Thompson, Sec. 1379, p. 3851).

The inconsistency and fatal error in finding that the ships had no value in excess of the bid price of $2,100 (*supra* pp. 3-4 F. 11) and that plaintiff, without prejudice to rights under its bid, offered $2,400 (*supra* p. 3 F. 7) and stating in Judge Littleton's opinion that they had a value of $2,122.42 each (R. 78), based upon inadmissible evidence of loss of a dismantler (*Robinson* v. *Samuels*, 196 S. W. 893, 900; *Reiser* v. *Lawrence*, 96 W. Va. 82), in the face of it having been called to the court's attention that the August 19, 1921 third party bidder of $2,400 each got the ships later for $3,318.58, warrants review and reversal.

Market value measures damages (*Sedgwick on Damages*, 9th ed. sec. 734); is the price in the ordinary course of trade (*Cliquot's Champagne*, 70 U. S. 114, 141-2; *Muser* v. *Magone*, 155 U. S. 240); is *opinion* based on sales, letters from dealers, etc., (*Chaffee* v. *U. S.* 88 U. S. 516, 542; *Wigmore on Evidence*, 3rd ed. Sec. 1943; *Alfonso* v. *U. S.*, 2 Storey 421; *Spring & Co.* v. *Edgar*, 99 U. S. 645, 657; *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403; *Sedgwick on Damages*

9th ed. Secs. 244-246); and is ascertained upon a proper consideration of all relevant facts (*Standard Oil Co.* v. *Sou. Pac. Ry. Co.* 268 U. S. 146, 156).

Payment of $183,000 interest, high salaries to stockholder officers for 7 years after the last ship was dismantled February 21, 1925 (R. 249) to dissolution December 27, 1932 (R. 254A) and other tremendous unnecessary expenses incurred because of inefficiency (R. 247-254C), accounted for the income tax refunded and profit of more than $10,500 a ship (R. 248, 254B), whereby audits of Western Marine & Salvage Co. showed a loss. Evidence of the loss (R. 199-200, 201, 193), as already shown was improperly received over objections and exceptions diligently urged.

Defendant should be bound by its own evidence that the material removed from the ships, and which plaintiff was to have received, had a value of $900,000. (R. 126, 133-134).

Damages were proved, including the $10,000 in getting ready to perform, after notice of acceptance of the bid and the $300. a month keeping good the certified check supporting the bid (R. 85).

V.

Defendant Does Not Own the Counterclaim.

The June 15, 1917 construction contract was necessarily made by the Fleet Corp. under its charter powers for profit (set out in *Haines* v. *Lone Star Shipbuilding Co.*, 268 Pa. 92, 110 Atl. 788) because its delegated sovereign powers were only received July 11, 1917 by Executive Order 2664 (R. 62). Obviously Executive Order 3018 of Dec. 3, 1918 ratifying its previous acts, related to those purporting to have been done under the power ultimately delegated. It could not substitute the Fleet Corp. exercising delegated sovereign powers in the contract with plaintiff for the Fleet Corp. therein exercising its commercial for profit charter

powers. The Fleet Corp. exercising delegated sovereign powers and the defendant are strangers to both the original and the supplemental contract (R. 62, 63-66). The authorities in Reason IV (p. 8 *supra*) recognized and gave effect to the distinction between acts of the Fleet Corp. in its above mentioned capacities. They conclusively show defendant does not own the counterclaim.

Receipts for the hulls (R. 66) was evidence that the vessels are in the possession of the Fleet Corporation (R. 215-216).

Neither the contract, its supplement nor rights thereunder were "acquired by the President through any agencies", but by and remained the property of, the Fleet Corp. under its commercial for profit charter powers. Therefore, said rights could not have been transferred to the Board by said section 4, as concluded below (R. 79, 68). Furthermore, corporate action would have been necessary to effect a transfer, as a sole stockholder cannot convey property of a corporation (*Humphreys* v. *McKissick*, 140 U. S. 304; *Fed. Sugar Ref. Co.* v. *U. S. Sugar Equaliz. Board*, 268 Fed. 575, D. C. S. D. N. Y.)

VI.

Allowance of Interest on the Unliquidated Counterclaim, Alone Justifies Review, for Substantial Justice.

Taking considerable testimony thereon and finally stipulating June 12, 1936 (R. 262-263), for use "upon the trial" that the amount of the counterclaim should be $299,918.27 is fatally inconsistent with any notion that there was an "account stated" in 1922, showing a balance of $488,310. Physical inspection should show that the words "upon the trial thereof" were added to the stipulation as an afterthought, to make sure that no interest before judgment would be claimed or allowed. Such was the intention of the parties. The stipulation provides that if recovery may be

had, there is "now", "upon the trial" (judgment) due $299,918.27.

The replication (R. 32-34) and the Fleet Corp.'s letter to plaintiff, after the statement has been sent, conceding that "the legal status" of plaintiff's claims for additional payments under the construction contract were "being considered by the Claims Commission", show plaintiff never before the stipulation agreed upon or admitted any amount to be due the Fleet Corp. There was never, therefore, any "account stated", binding in a legal sense. The finding (R. 68) does not state that plaintiff accepted as correct the statement rendered. The evidence is to the contrary.

Authorities below (R. 79-80) have no application. Those in Reason V do (pp. 8-9 *supra*). Allowance of the $324,561 interest before judgment on the unliquidated counterclaim is gross injustice.

Conclusion.

The petition for the writ of certiorari should be granted.

Respectfully submitted,

ASBURY HAYNE DEYAMPERT,
HERBERT M. BINGHAM,
Counsel for Petitioner.

(1858)

MAR 7 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 681

THE SHIP CONSTRUCTION & TRADING CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER.

ASBURY HAYNE DEYAMPERT,
HERBERT M. BINGHAM,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION.

Respondent's argument (p. 8) that "petitioner has not shown that he (it) acted in reliance, and to his (its) detriment, on Commissioner Plummer's communications" to petitioner of acceptance by the Board of petitioner's bid as amended, ignores the unquestioned contrary fact. The reliance was detrimental in excess of $10,000, and otherwise (R. 85).

The argument (pp. 8-9) that petitioner's actual forbearance to sue, pending further negotiations for an agreement as to the form of the formal contract required

by the amended bid, was not requested by the Board nor the result of a bi-lateral agreement, and was therefore no consideration for the option giving petitioner until "September 29th at noon" to accept the formal contract offered and demanded by the Board, is likewise blind to unquestioned facts conclusively showing the contrary. Petitioner had already threatened suit (R. 84). The parties conferred. The Board recorded the result in its letters to petitioner:

> "You claim to have certain rights * * * and the * * * Board denies that you have such rights. Nevertheless, it is agreed that the *status quo* shall be maintained without prejudice to the rights of either side, pending an effort to arrive at a satisfactory contract and that the resolution", giving petitioner until Aug. 23rd to execute the form of formal contract demanded by the Board (R. 52), shall be extended until "September 29th at noon" (R. 54-55).

The facts satisfy the tests of forbearance as consideration in all of the authorities.

Negotiations before Aug. 9, 1921 were for a contract. Negotiations after that date were for an agreement upon the form of a formal contract required by the amended bid which petitioner had been officially informed the Board accepted August 9, 1921.

Since *Williams* v. *Craig* 1 Dallas (1 U. S.) 313, 315-316, this Court has disallowed interest on unliquidated demands not capable of liquidation by computation, such as the instant counterclaim. *Miller* v. *Robertson,* 266 U. S. 243, 258, relied upon by respondent (p. 11), is in fact and according to the digests of Federal decisions an authority for petitioner. *Stephens* v. *Phoenix Bridge Co.,* 139 Fed. 248, (C. C. A. 2nd) is very similar to the instant case; see also: *Mowry* v. *Whitney,* 81 U. S. 620; *Goelet* v. *Ward,* 242 Fed. 65 (C. C. A. 2nd); *Zurich General Accident Co.*

v. *Mid-Continent Petroleum Co.*, 43 Pac. (2nd) 355; and *In re Paramount-Publix Corp.*, 85 F. (2d) 42.

Respondent's other arguments are adequately refuted in petitioner's main brief.

Respectfully submitted,

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HERBERT M. BINGHAM,
Counsel for Petitioner.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 69–80) is reported in 91 C. Cls. 419.

JURISDICTION

The judgment of the Court of Claims was entered on April 1, 1940 (R. 80). A motion for a new trial was overruled on October 7, 1940 (R. 80–81). The petition for a writ of certiorari was filed on January 6, 1941 (R. 263). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

The United States Shipping Board advertised certain ships for sale. Petitioner was the highest bidder. The court below found that the Board never accepted petitioner's bid, and a counterproposal submitted by the Board for acceptance within a stated time was withdrawn before acceptance by petitioner. On petitioner's suit for breach of contract, the United States counterclaimed for certain overpayments made to petitioner by the Emergency Fleet Corporation. The questions presented are:

1. Whether the finding of the court below that the Board did not accept petitioner's bid is supported by substantial evidence.

2. Whether petitioner's unrequested forbearance from suit rendered ineffective the Board's revocation of its counter proposal within the period set for acceptance.

3. Whether the finding of the court below that the fair market value of the ships did not exceed petitioner's bid is supported by substantial evidence.

4. Whether the United States owns the counterclaim, either as principal on the contracts or as successor to the rights of the Emergency Fleet Corporation.

5. Whether the United States is entitled to interest on the counterclaim from the date of its

rendition of an account to petitioner and demand for the balance claimed to be due.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix, *infra*, pp. 14–18.

STATEMENT

Petitioner brought this suit to recover $3,198,298[1] for breach of a contract claimed to have been entered into between petitioner and the United States Shipping Board (R. 2–16, 35). The United States counterclaimed for an overpayment made to petitioner by the Emergency Fleet Corporation in connection with another transaction (R. 17–19, 35).[2]

The facts, as found by the Court of Claims (R. 35–68), may be summarized as follows:

In the summer of 1921 the United States Shipping Board publicly advertised for sale 285 wooden ships (R. 36–38). Petitioner submitted the highest bid, $2,100 per ship (R. 39–40). Certain of the conditions attached to the bid were unacceptable to the Board, and an amended bid was submitted on August 5, 1921 (R. 40–44).

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[1] Petitioner originally claimed $4,691,000 (R. 15) but subsequently reduced its claim to $3,198,298, the amount claimed in the petition for certiorari (Pet. 1).

[2] On November 3, 1930, the Court of Claims overruled petitioner's demurrer to the Government's counterclaim, and on January 12, 1931, overruled petitioner's motion for reconsideration (R. 1). Certiorari was denied by this Court. 285 U. S. 835 (R. 2).

At a meeting of the Board on August 9, 1921, Commissioner Plummer proposed a resolution accepting petitioner's bid, except as to vessels covered by higher bids (R. 45–46). The minutes of the meeting showed that the resolution was adopted (R. 45–48). However, Commissioner Lissner, who had been designated by the Board to verify and approve its minutes, refused to approve that part of the minutes relating to the acceptance of petitioner's bid, and that part was never adopted, ratified, or approved by the Board (R. 48). The court below found that at the August 9th meeting no definite action was taken on petitioner's bid, decision being delayed until the Board was satisfied, among other things, as to petitioner's financial standing, and for submission of the proposal to the President (R. 48–49).

However, Commissioner Plummer, who had been absent during part of the discussion and who was not correctly informed as to the action which the Board had taken, notified petitioner that the Board had accepted petitioner's bid (R. 50–51).[3] This notification was not authorized by the Board, and on learning of it the Board notified petitioner

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[3] Commissioner Plummer had the Board's Secretary send petitioner a copy of the proposed resolution accepting petitioner's bid (R. 50–51). To this copy the Secretary signed the names of Commissioner Plummer and Edward P. Farley (R. 51), who was in charge of selling the ships (R. 153). Mr. Farley did not know of the existence of the document until later (R. 51).

that it had not accepted its bid (R. 51–52). After further negotiations the Board, on August 19, adopted a resolution authorizing the presentation of a contract to petitioner, and giving petitioner until August 23 to accept (R. 51–54). Petitioner having objected to various terms, negotations were continued and the resolution of August 19 was successively extended, petitioner being given until September 29th to accept (R. 54, 55). On September 27, however, the Board, having been advised by counsel that an appraisal of the value of the ships as required by statute had not been made, adopted a resolution revoking its offer to petitioner (R. 55). On receiving a copy of this resolution, petitioner, on September 28th, signed the contract and demanded performance (R. 55–58). The Board declined to be bound and did not further attempt to enter into a contract with petitioner (R. 58).

On August 22, 1922, the Board had the ships appraised: the appraisement was at $2,500 per ship (R. 58). Between September 1922 and August 1923, 235 of the ships were sold at an average price of $3,318.58 (R. 58). The ships were then scrapped by the purchaser, who sustained an average loss of $1,196.16 per ship. Between December 1921 and June 1922, 18 of the 268 ships were scrapped by the Board, yielding an average net receipt of $2,061.45 per vessel (R. 58–59).

The court below denied recovery on petitioner's claim on the ground that no contract had been entered into for the sale of the wooden ships to petitioner, and on the further ground that there was no market for such ships and that the fair value did not exceed petitioner's bid.

The United States' counterclaim arose out of a contract and supplemental contract entered into between the United States Shipping Board Emergency Fleet Corporation and petitioner, pursuant to the Shipping Act of September 7, 1916, c. 451, Sec. 11, 39 Stat. 728, 731, 46 U. S. C. sec. 810, and Executive Orders of July 11, 1917, and December 3, 1918 (R. 59–62). See Appendix, *infra*, pp. 15–18. Under the original contract, entered into on June 15, 1917, petitioner was to construct two wooden hulls (R. 62–63). On October 29, 1917, the Fleet Corporation, as permitted by the terms of the contract, terminated petitioner's right to proceed further, on account of its failure to make satisfactory progress (R. 63). On November 22, 1917, the Fleet Corporation entered into a supplemental contract with petitioner whereby petitioner was to complete the hulls partially constructed under the original contract (R. 63–66). On the completion of the hulls the Fleet Corporation overpaid petitioner in the amount of $299,918.27 (R. 66). The cause of action for the overpayment accrued on July 28, 1919 (R. 66). On February 28, 1922, the Fleet Corporation rendered an account showing a

balance due it from petitioner of $488,310.24, and made demand for that amount (R. 68).[4]

The court below held that the United States was entitled to recover on its counterclaim for $299,918.27, with interest from February 28, 1922, the date of the rendition of account and of demand of payment by the Fleet Corporation.

ARGUMENT

1. The court below found that the United States Shipping Board did not accept petitioner's bid at the meeting of August 9, 1921 (Fdg. 4, R. 45–49). The evidence admits of no other conclusion. The testimony of the Commissioners (R. 103–105, 109, 112, 113, 115, 117, 124), discussed in the opinion below (R. 72–77), clearly shows that the Board did not take final action with respect to petitioner's bid, and that the resolution authorizing acceptance was acted upon informally only, and subject to Presidential and Congressional approval (R. 73, 74, 105, 106, 111, 113, 115–117) and to a satisfactory showing of financial responsibility on petitioner's part (R. 118, 119).

In notifying petitioner that the Board had accepted its bid, and transmitting a copy of the proposed resolution, Commissioner Plummer acted under misapprehension and without authority (R. 76–77). His action, therefore, was not bind-

[4] Subsequently, on June 12, 1936, the claim was reduced to $299,918.27 by stipulation (R. 262–263).

ing on the Board. The United States is not bound by the unauthorized acts of its agents, even in so-called "commercial" transactions. *The Floyd Acceptances,* 7 Wall. 666; *Whiteside* v. *United States,* 93 U. S. 247; *Pine River Logging Co.* v. *United States,* 186 U. S. 279. Compare *United States* v. *Summerlin,* 310 U. S. 414. And were the rule otherwise, petitioner has not shown that he acted in reliance, and to his detriment, on Commissioner Plummer's communications. Compare *Wilber National Bank* v. *United States,* 294 U. S. 120, 124.

Petitioner's acceptance, on September 28, 1921, of the contract submitted by the Board was ineffectual, since the acceptance was made with knowledge that the offer had been withdrawn on the previous day. The contention that the Board was bound to keep the offer open until September 29 because of petitioner's forbearance from suing for breach of contract is without substance. It is not suggested that the parties executed a bilateral agreement whereby petitioner undertook to forbear, and, as the cases cited by petitioner specifically state, actual forbearance in the absence of a request to do so does not constitute consideration for a unilateral contract. *Union Bank* v. *Geary,* 5 Pet. 99; *In re All Star Feature Corp.,* 232 Fed. 1004 (S. D. N. Y.); *Dillon* v. *Lineker,* 266 Fed. 688 (C. C. A. 9th); Williston on *Contracts,* Sec. 136, p. 479. The record is barren of

any evidence that the Board requested petitioner to forbear from suit. The Board merely continued to negotiate with petitioner in an attempt to arrive at a contract satisfactory to both parties (R. 51–55).

2. Even assuming a contract was entered into, petitioner failed to prove any damages by reason of its breach. The court below found that there was no market for the wooden ships, due to the complete collapse of the shipping industry in 1920, and that the fair market value of the ships, best evidenced by the subsequent transactions concerning them, did not exceed the amount of petitioner's bid (R. 58–59, 77–78). The Court of Claims rejected petitioner's proof as to fair value as "conjectural and based on estimates not supported by any substantial or convincing facts" (R. 59, 78). "It was for the Court of Claims to decide what weight such facts deserved * * *" *United States* v. *Goltra,* Nos. 191, 192, October Term, 1940, decided February 3, 1941.

3. Petitioner's contention that the United States does not own the counterclaim is plainly without merit. The Fleet Corporation acted as the agent of the United States, exercising powers delegated to it by the President under executive orders of July 11, 1917, and December 3, 1918, set out, *infra,* pp. 15–18. All the transactions of the Fleet Corporation, including those from which the counterclaim stemmed, were financed by pub-

lic funds appropriated by Congress. Clearly, therefore, the United States could sue to recover overpayments made by the Fleet Corporation. *United States* v. *Skinner & Eddy Corporation*, 35 F. (2d) 889 (C. C. A. 9th); *Crane* v. *United States*, 73 C. Cls. 677; cf. *King County, Washington* v. *United States Shipping Board*, 282 Fed. 950 (C. C. A. 9th). But in any event, this claim was unquestionably transferred to the Shipping Board by Section 4 of the Merchant Marine Act of 1920, set out *infra*, p. 14, and could thereafter be asserted by the United States as its own.[4] *Emergency Fleet Corporation* v. *Western Union*, 275 U. S. 415, 424; *United States* v. *Czarnikow-Rionda Co.*, 40 F. (2d) 214 (C. C. A. 2d); see *King County, Washington* v. *United States Shipping Board, supra*, at 951.

Of the cases cited by petitioner (Pet. 8) only *United States* v. *Wood*, 290 Fed. 109 (C. C. A. 2d), affirmed without opinion, 263 U. S. 680, in-

[4] The counterclaim is not barred by the statute of limitations. Even assuming that the statute could be pleaded in bar if the claim had remained in the hands of the Fleet Corporation, the transfer of the claim to the Shipping Board destroyed any such defense. The Shipping Board is clothed with all the sovereign immunities (*Cohn* v. *United States*, 20 F. (2d) 56 (C. C. A. 6th); see *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. (2d) 573, 577 (C. C. A. 8th), certiorari denied, 291 U. S. 672), and since it acquired the claim before the limitation period had run, the statute of limitations cannot be pleaded as a bar. *United States* v. *Nashville, &c. Ry. Co.*, 118 U. S. 120, *United States* v. *Czarnikow-Rionda Co.*, *infra*.

volved the right of the United States to assert a claim founded on a contract executed by the Fleet Corporation. And that case merely held that the United States could not establish a preference by an independent action in equity after the Fleet Corporation had first filed the claim in bankruptcy in its own name, and its claim for preference had been rejected. See *Whan* v. *Green Star S. S. Corp.*, 22 F. (2d) 483, 487–488 (C. C. A. 2d).

4. Petitioner also challenges the lower court's award of interest on the counterclaim from March 18, 1922, the date on which the Fleet Corporation rendered an account to petitioner and made demand for payment of the balance due. Petitioner contends that interest could not properly be allowed because the counterclaim was unliquidated; and that the stipulation entered into in 1936 fixing the amount of the overpayment at $299,918.27, a figure lower than that asserted by the Fleet Corporation in 1922, not only shows that the claim was theretofore unliquidated but was intended to fix the total amount of the judgment.

In the first place, a trial court has considerable discretion in the allowance of interest even on unliquidated demands: "One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made." *Miller* v. *Robertson*, 266 U. S. 243, 257–258. No showing is made that the court below abused its discretion in allowing interest.

Petitioner agreed to repay the amount advanced by the Fleet Corporation for completion of the vessels in excess of the original contract price (R. 65–66). The amount of the overpayment was thus known to petitioner or readily ascertainable. Cf. *Miller* v. *Robertson, supra,* at 258.

In the second place, the rendition of an account and demand for payment may start the running of interest even in cases where it would not otherwise be allowed. *United States* v. *Skinner & Eddy Corporation,* 35 F. (2d) 889, 901–902 (C. C. A. 9th). This principle is recognized in the cases relied on by petitioner (Pet. 9). See *Standard Steel Car Co.* v. *United States,* 67 C. Cls. 445, 490–491; *Truscon Steel Co.* v. *United States,* 70 C. Cls. 727, 729–730. It is immaterial to the operation of this principle that the demand in 1922 was for a greater amount than that fixed in the stipulation entered into in 1936. *United States* v. *Skinner & Eddy Corporation, supra,* at 902.

The suggestion that the statement in the stipulation, that "there is now justly due and owing the defendant from the plaintiff the sum of $299,918.27" (R. 263), was intended to fix the total amount of the judgment seems plainly unfounded. Elsewhere the stipulation recites that the Fleet Corporation overpaid petitioner by that amount (R. 263), and there is nothing in the stipulation indicative of an intention to waive interest.

CONCLUSION

The petition raises no question of public importance, and there is no conflict of decisions. The findings of the court below are supported by substantial evidence. It is therefore respectfully submitted that the petition should be denied.

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FEBRUARY 1941.

APPENDIX

Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 46 U. S. C., Sec. 861, *et seq.*:

SEC. 4. All vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by section 862, or in pursuance of the joint resolution entitled "Joint Resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes", approved May 12, 1917, with the exception of vessels and property the use of which is, in the opinion of the President, required by any other branch of the Government service of the United States, are hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this chapter.

SEC. 5. In order to accomplish the declared purposes of this chapter, and to

carry out the policy declared in section 861 hereof, the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this chapter, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in the following section, all of the vessels referred to in the preceding section or otherwise acquired by the board. Such sale shall be made at such prices and on such terms and conditions as the board may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The board in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent businessman in the sale of similar vessels or property which he is not forced to sell. All sales made under the authority of this chapter shall be subject to the limitations and restrictions of section 808.

Executive Order No. 2664, July 11, 1917:

By virtue of the authority vested in me in the section entitled "Emergency Shipping Fund" of an Act of Congress entitled "An Act Making appropriations to supply

urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, insofar as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

Executive Order No. 3018, December 3, 1918:

Delegating to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, powers granted to the President by Acts of Congress relative to the Emergency Shipping Fund and approved on or prior to November 4, 1918.

Whereas, by Executive Order No. 2664, dated July 11, 1917, I delegated to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, certain powers vested in me under the section entitled "Emergency Shipping Fund" of the Urgent Deficiency Appropriation Act approved June 15, 1917; and

Whereas, since the issuance of said Executive Order, the said powers granted in said Act have been variously affected or extended by the section entitled "Emergency Shipping Fund" of the Urgent Deficiency Appropriation Act approved October 6, 1917, by Public Act No. 138—Sixty-fifth Congress approved April 22, 1918, amending said section of said Act of June 15, 1917, and by the sections entitled "Emergency Shipping Fund" in the Sundry Civil Appropriation Act approved July 1, 1918, and in the First Deficiency Appropriation Act, 1919, approved November 4, 1918, respectively,—

Now, therefore, by virtue of the authority vested in me by said laws, supplementing said Order No. 2664, but in no way limiting or restricting the effect thereof, or of acts heretofore done in pursuance thereof, I do hereby delegate all the power and authority so vested in me, and do direct that—

1. The United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction; and

2. The United States Shipping Board shall have and exercise, subject to its discretion in turn to delegate such exercise as provided in said Executive Order No. 2664, all power and authority now vested in me by said laws with reference to constructed drydocks, marine railways and piers, and to constructed vessels or parts thereof or charters therein; to the operation, management and disposition of such drydocks, marine railways, piers and vessels; and to such other matters as are not herein mentioned.

3. All acts heretofore done by said Corporation or by said Board, with reference, respectively, to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes or any of them, be, and they are hereby, ratified and confirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1941